No. 97-210

(4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, and CORNING INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner undertakes herein only to meet arguments advanced in respondents' brief in opposition that were not adequately anticipated in the petition.[1]

1. The Purported Violation of the Sixth Circuit's Mandate Is an Insubstantial Diversion From the Central Question Regarding the Effect of 28 U.S.C. § 1334(d)

The Court of Appeals stated two grounds -- enforcement of its mandate and application of the *expressio unius* maxim -- to find mandamus jurisdiction despite the clear proscription in 28 U.S.C. § 1334(d) against appellate review of decisions granting abstention under § 1334(c). *See* Pet. App. 6-7. Respondents suggest that the important question about § 1334(d) posed by the petition may be avoided altogether on the first ground, which they now elevate to the "principal basis for mandamus jurisdiction" (Br. in Opp. 7). But that argument devises a "mandate" from patently *obiter dictum* on a subject that was in no way presented by the first appeal.

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[1] The mandamus order of which review is sought runs neither for nor against Minnesota Mining and Manufacturing Company ("3M"), which, accordingly, is not named as a respondent to the petition for a writ of certiorari. That company has nevertheless filed a 20-page brief opposing certiorari. While petitioner believes 3M lacks standing here, its brief is not in any event a substantial addition to the papers already before the Court. It seems clear, for instance, contrary to 3M's view, that the central issue of the Circuit's appellate jurisdiction is not less ripe for review than was the similar issue in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Litigation against Dow Chemical in courts throughout the country has been halted and transferred as a result of the decision below, causing current injury to thousands of claimants notwithstanding the District Court's potential ability to entertain individual abstention motions at a later procedural point.

It is no ground for avoiding review of the squarely presented question respecting § 1334(d).

The only question on which the Sixth Circuit ruled in the first appeal, there being no occasion to consider an abstention decision that had not yet been made, concerned "the subject matter jurisdiction of federal district courts, sitting as bankruptcy courts, over proceedings 'related to' a case filed under Chapter 11 of the Bankruptcy Code, and the ability of federal district courts to transfer such proceedings to the district court in which the bankruptcy case is pending." *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482, 485 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 718 (1997) (Pet. App. 22a). Reversing the District Court on the "related to" question, and finding there was power to transfer, the Circuit remanded, leaving the still open question of abstention to the District Court and making the observations on how to deal with abstention that are now put forth by respondents as a "mandate." But those expressions concerning what might or should happen did not and could not create in advance appellate jurisdiction over a subsequent abstention decision rendered non-reviewable (as petitioner urges) by 28 U.S.C. § 1334(d).

The unquestioned authority of *United States v. District Court*, 334 U.S. 258 (1948), affirming the appellate power to enforce an actual mandate by mandamus (*see* Br. in Opp. 9), has no bearing here. Jurisdiction of the type urged exists only to enforce an appellate court's decision of "whatever was before [the] court, and disposed of by its decree." *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978). Here, it is plain that abstention was not before the Court of Appeals on the first apeal, and the dictum about

abstention could create no "mandate" because it dealt with no issue presented for decision. Of course, this Court retains clear authority to determine the scope of the lower court's mandate. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965).

The finding by the Circuit of mandamus power despite § 1334(d) is not insulated from review and not rendered "purely academic" (Br. in Opp. 7) by the supposed alternative or "principal" basis respondents invoke. If, as petitioner urges, the Circuit's treatment of § 1334(d) is important and mistaken, the correction of the error will be a definitive, final, and authoritative reversal, unaffected by the purported mandate issue.

2. The Sixth Circuit's Construction of 28 U.S.C. § 1334(d) Does Violence to the Clear Intent of Congress

Without revisiting the misuse of *expressio unius*, the substantial departure from this Court's precedents, and the neglect of legislative history argued in the petition (at 10-13), petitioner notes some distortive devices to which respondents are led in defending what the Court of Appeals wrote. Urging a textual, "plain language" analysis, respondents stress that § 1334(d) bars review by mentioning 28 U.S.C. §§ 158(d), 1291, and 1292, but not mentioning § 1651 (mandamus). But the plain language leads them finally to the point where § 1334(d) says an abstention decision "is not reviewable by appeal *or otherwise*." The italicized words are faced down in a footnote (p. 12 n.4), where we are told that these words refer not to mandamus but to interlocutory appeals under 28 U.S.C. § 1292(b). That surprise comes from nowhere and rests on nothing; the filing of an "application" rather than a "notice" of appeal does not render

the proceeding any less an *appeal* -- leaving respondents without an explanation for the "or otherwise" language. The argument from plain language collapses.

By a parity of flawed analysis, respondents announce that the legislative history teaches nothing despite the unequivocal statement, quoted in the petition (p. 11), showing that the enumeration of specific courts and statutes was designed precisely to mark district court appellate power over bankruptcy court abstention decisions while barring any further appeals to the circuits or to this Court. That in turn is dismissed with the pronouncement (Br. in Op. 12) that Congress could have expressed this purpose in another way. The wisdom of Justice Holmes, on Circuit almost a century ago, remains apt: "[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908).

Nor can respondents escape the controlling principles announced in *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494 (1995), on the ground that no formal mandamus petition was filed in that case. *See* Br. in Opp. 10 n.3. The same is true here -- respondents filed only a notice of appeal, which the Court of Appeals chose to treat as a mandamus petition. This Court found no basis for reaching out in the same manner to create jurisdiction in *Things Remembered*.[2]

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[2] 3M misleadingly suggests (Br. 15) that courts have routinely granted mandamus to review abstention decisions subject to the clear bar of § 1334(d). No such case exists. Those cited by 3M involved court-made abstention doctrines, *e.g.*, *In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 476 (8th Cir. 1995) (recognizing availability of mandamus "'[a]bsent statutory prohibitions'") (citing *Thermtron*, 423 U.S. at

(continued...)

3. Section 157(b)(5) Was Not Intended to Effect Mass Transfer of Nondebtor Litigation

The transfer power found by the Court of Appeals in 28 U.S.C. § 157(b)(5) over tort claims against nondebtors is justified by respondents as a needed means to "centralize" such claims in the bankruptcy court with claims against the debtor. The undocumented assertion is belied by experience. The transfer order has been nothing more or less than a formula for paralysis, blocking thousands of suits against nondebtors while not advancing the bankruptcy proceedings in the slightest degree. The now insulated shareholder corporations have never evinced a desire to have their transferred cases do anything but rest immobile on the now overloaded docket of the United States District Court for Eastern Michigan. Now, in the bankruptcy, the Debtor is seeking to give its shareholders a free release of all liability through its plan of reorganization -- a ploy that does not involve trying the claims against the shareholders and makes clear that transfer was sought not to permit centralized adjudication but to forestall litigation. The suggestion that transfer was or is necessary to "facilitate reorganization" (*id.* at 16) is a myth. The situation underscores the widely destructive fallacy of the Sixth Circuit's ruling that transfer

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[2](...continued)

353) or cases remanded on grounds not authorized by 28 U.S.C. § 1447(c) and hence reversible on mandamus notwithstanding § 1447(d), *e.g.*, *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993).

of nondebtor litigation was contemplated by the drafters of § 157.[3]

Respondents suggest (Br. in Op. 16) that since § 157(b)(5) does not repeat the language in § 157(b)(2) referring to personal injury claims "against the estate," it must have been intended to empower the district court to transfer all personal injury claims against any defendant. But if Congress had meant to create such a sweeping and novel power over nondebtor litigation, it would likely have done so expressly and not by negative implication in a statute otherwise devoted to dividing up business within the bankruptcy between the district and bankruptcy courts.

Respondents' central argument for their broad reading of § 157(b)(5) is the supposed Congressional policy mandating total centralization of all conceivably "related to" litigation in the bankruptcy forum. While the Sixth Circuit holds that it has located such a policy, Congress has never expressed it. The Circuit relied for this point on two distinguishable cases -- *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), which as noted (Pet. 16-17) focused its analysis almost entirely on claims against the debtor and in any event involved only a single product and

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[3] Respondents cannot seriously suggest that they act to prevent "requiring plaintiffs seeking compensation for one injury to litigate the same issues on two fronts." Br. in Opp. 16-17 n.8. Respondents' mission is to minimize, not maximize, convenience and recovery for tort plaintiffs. Moreover, the suggestion that the claims against the shareholders are "merely duplicates" of those against the Debtor (Br. in Opp. 16-17 n.8) is incorrect at best. Dow Chemical has been held liable by at least two juries for its separate and independent tortious conduct in connection with the testing and development of silicone for implantation in the human body.

manufacturer,[4] and *Murray v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.)*, 16 F.3d 513 (2d Cir. 1994), which concerned only claims against Pan Am and its affiliates.

The legislative history underlying *Robins* and *Pan Am.* does not reflect that Congress gave any consideration to nondebtor claims in expressing a policy to promote centralization of bankruptcy proceedings. For example, Rep. Robert Kastenmeier's oft-quoted statement that the purpose of § 157 was to avoid "creating a multiplicity of forums for adjudication of parts of a bankruptcy case" actually had nothing to do with transferring claims against nondebtors:

> The House-passed bill contained a definition of what a bankruptcy judge could properly do. The Senate bill adopted a largely similar view with one exception. Under the Senate-passed bill, bankruptcy judges could not hear unliquidated claims. The Senate approach would have repudiated decades of bankruptcy law and practice. The change in the definition in the Senate-passed bill would have contradicted the basic purposes of the consolidated jurisdiction we adopted in 1978 in response to the recommendations of the Commission on Bankruptcy Laws. Finally, it would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.

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[4] Petitioner did not, as Dow alleges (Br. in Opp. 15 n.7), claim that no transfer was ever *ordered* in *Robins*. However, the transfer initially ordered by the district judge was never *effected* because the notice required by the Fourth Circuit was never given to individual plaintiffs. Our sufficient point is that the absence of such transfer did not impede resolution of the bankruptcy. *See* Pet. 21.

130 Cong. Rec. H7492 (daily ed. June 29, 1984) (citation omitted), *reprinted in* 4 *Collier on Bankruptcy* (Appendix) XX-18 through XX-19 (15th ed. 1996).

In context, it is clear that Rep. Kastenmeier was concerned only about preserving centralized liquidation of *claims against the estate*. His statement cannot be read to show that this venue-setting provision was intended to create broad new powers to transfer nondebtor cases. The Sixth Circuit has read into § 157(b)(5) a power never intended by Congress, a sound additional reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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